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Supreme Court, U.S.
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No. 10-160

IN THE

Supreme Court of the United States

KRISTIN BAUM,
Petitioner,

v.

ASTRAZENECA LP,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. As required by Pennsylvania law, the court of appeals in this case applied federal regulations promulgated pursuant to the Fair Labor Standards Act to interpret the parallel Pennsylvania Minimum Wage Act. In doing so, did the court of appeals err in disregarding and deciding contrary to the Secretary of Labor's interpretations of those federal regulations, which are entitled to controlling deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905 (1997) and which another circuit's court of appeals adopted as controlling under materially indistinguishable facts in *In re Novartis Wage and Hour Litigation*, -- F.3d --, 2010 WL 2667337 (2nd Cir., July 6, 2010)?

2. Is petitioner outside of the administrative and outside sales exemptions of the Pennsylvania Minimum Wage Act?

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The presence of a federal question in this case is incontrovertible: the Court of Appeals for the Third Circuit was required to look to federal law to establish the parameters of the administrative and sales exemptions at issue in this case; the court of appeals did in fact apply federal law in interpreting the administrative exemption (and did not reach the sales exemption); and, both parties cited to federal law in their briefing on the administrative and sales exemptions to the courts below. Notwithstanding the obvious, in an attempt to avoid review by this Court, Respondent now argues that such review is unwarranted because there is no federal question presented

in the context of this case. *See* Respondent's Brief in Opposition ("Opp.") at 6-7. This argument is disingenuous at best, and should be rejected.

A. Federal Law Controls The Outcome Of This Case

Respondent mischaracterizes the legal issues here in dispute as "state-law issues" (Opp. at 1) in an effort to convince this Court that it should not intervene to correct the Third Circuit's unwarranted departures from controlling Supreme Court precedent set forth in *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905 (1997).[1] Respondent's position is belied, however, by Pennsylvania law, the Third Circuit's opinion below, and Respondent's own briefing to the courts below.

First, Pennsylvania law *requires* that courts use federal regulations interpreting the FLSA[2] to interpret the state's substantially similar PMWA[3] in those situations, such as here, where the state did not promulgate regulations for the PMWA's statutory terms. *Commonwealth of Pennsylvania Dept. of Labor and Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003) ("it is proper to give deference to federal interpretation of a federal statute when the state statute substantially parallels it"), *aff'd*, 580 Pa. 66, 859 A.2d 1253 (Pa. 2004). Therefore, even though Petitioner's

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[1] In *Smith v. Johnson and Johnson*, 593 F.3d 280 (3rd Cir. 2010), another recent FLSA case concerning pharmaceutical representatives, the Court of Appeals for the Third Circuit also failed to consider or follow *Auer*.

[2] Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq*.

[3] Pennsylvania Minimum Wage Act (PMWA), 43 Pa. C.S.A. §§ 333.101-333.115.

claims in this case arise under the PMWA rather than the FLSA, her claims depend upon the meaning of the federal regulations implementing the sales and administrative exemptions to the FLSA.

Second, Respondent's position that this case is about "state-law issues" is contradicted by the Panel's opinion in this case, which specifically recognized that Pennsylvania law required it to apply federal regulations. (*See* App. C at 16a n.4 (citing *Commonwealth of Pennsylvania Dept. of Labor and Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003), *aff'd*, 580 Pa. 66, 859 A.2d 1253 (Pa. 2004) ("According to the Pennsylvania courts, 'it is proper to give deference to federal interpretation of a federal statute when the state statute substantially parallels it.'")). The court of appeals therefore applied the federal regulations promulgated pursuant to the FLSA administrative exemption, and in particular 29 C.F.R. § 541.202 (defining "discretion and independent judgment"), to interpret the PMWA administrative exemption. (*See* App. C, 17a to 18a, citing federal code sections 29 C.F.R. §§ 541.202(a) and (c)).

Third, Respondent's new position -- that this case has nothing to do with federal law -- is undercut by the fact that Respondent consistently cited to FLSA regulations and case law interpreting those federal regulations in its briefing to the courts below on the meaning of the PMWA exemptions. (*See, e.g.*, Supplemental Appendix ("Supp. App.") A, Excerpts of Memorandum in Support of AstraZeneca LP's Motion for Summary Judgment as to the Claims of Kristin Baum, at 102a (citing 29 C.F.R. § 541.205 (2004)); *id.* at 103a (citing 29 C.F.R. § 541.207 (2004)) Additionally, in its brief to the Third Circuit, rather than

asserting its current position (*i.e.*, that federal law supposedly doesn't apply), Respondent instead argued "the Department of Labor's position fully supports AstraZeneca." (*See* Supp. App. B, Excerpts of Response Brief of Appellee AstraZeneca, at 106a; *see also id.* at 106a-107a, 109a, 111a (citing Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122 (2004)); *id.* at 107a, 111a (citing 29 C.F.R. § 541.201); *id.* at 111a-112a (29 C.F.R. § 541.202)); *id.* at 107a (citing 29 C.F.R. § 541.203). Respondent also cited *Stuber* for proposition that Pennsylvania law directs courts to apply FLSA regulations to interpret the PMWA. (*See id.* at 107a, 111a).

As all of this reflects, there was no dispute below that federal law applied, nor was there any dispute that the determination of whether Petitioner fell within the administrative exemption was controlled by the meaning of the federal regulations. Respondent's belated, self-serving attempt to convince this Court that this case does not concern federal law should therefore be soundly rejected.

B. The Court Of Appeals Misapplied Federal Law

Although the Third Circuit Panel was correct to apply federal law, it erred in so doing by failing to consider or account for the Department of Labor's interpretation of the federal administrative exemption, (*see* App. C, 12a to 20a) when that interpretation was entitled to controlling deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905 (1997). As a result, the court of appeals interpreted the federal exemption in a manner that conflicts with the interpretation of that exemption provided by the Depart-

ment of Labor (*see* App. G, 92a to 93a), and in a manner that conflicts with the interpretation of that exemption rendered by the Court of Appeals for the Second Circuit in *In re Novartis Wage and Hour Litigation*, -- F.3d --, 2010 WL 2667337 (2nd Cir., July 6, 2010).

Respondent posits that the Third Circuit did not contravene this Court's decision in *Auer* or create a circuit split, simply because Petitioner's claims are brought under state law. (Opp. at 8-11). However, this type of argument elevates form over substance. It is demonstrable from the Third Circuit's opinion that the court of appeals was applying and interpreting federal law, and that Petitioner was ultimately found exempt under the PMWA because the court of appeals determined that she fell within the parameters of the federal administrative exemption. (*See* App. C, at 12a to 20a)

Given that the Third Circuit was applying federal law, it should have applied that corpus as a whole, including the DOL's interpretation of the administrative exemption, rather than simply picking and choosing arbitrarily. Irrespective of whether Petitioner's claims were brought under state or federal law, if the court of appeals was applying federal law, it had to do so properly and consistent with this Court's directive in *Auer*. Its failure to do so, in violation of controlling precedent, was clear error.

CONCLUSION

For the reasons stated, the Court should grant the petition.

Respectfully submitted,

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September 1, 2010

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

[Filed: 03/28/2008]

KRISTIN BAUM, on behalf of herself and all others similarly situated,

CIVIL ACTION NO. 3:07-cv-00090-KRG

Plaintiff,

v.

JUDGE KIM R. GIBSON

ASTRAZENECA LP,

Defendant.

MEMORANDUM IN SUPPORT OF ASTRAZENECA LP'S MOTION FOR SUMMARY JUDGMENT AS TO THE CLAIMS OF KRISTIN BAUM

* * *

A. Baum Meets The Salary Test

To begin with, Baum meets the first requirement of the administrative exemption short test because she earned an annual salary of $63,000 per year, which translates to $1,211.54 per week. SUF ¶ 59. This is nearly five times more than the required $250 per week. *See* 34 Pa. Code § 231.83(5).

B. Baum's Primary Duty Was Management or General Business Operations

In addition, to the extent that Baum engaged in promotional work rather than sales, she met the

second requirement of Pennsylvania's short test for the administrative exemption because her primary duty "consist[ed] of the performance of office or nonmanual work directly related to management policies or general operation of [her] employer." 34 Pa. Code § 231.83(1). Job activities are so related if they involve "the administrative operations of a business." 29 C.F.R. § 541.205(a) (2004). The "administrative operations of a business," in turn, include work performed by white collar employees who "service" the business by, for example, "representing the company [and] promoting sales." 29 C.F.R. § 541.205(b) (2004). Thus, "promotion men" are a quintessential example of employees who perform work directly related to management policies or general business operations. 29 C.F.R. § 205(c)(5) (2004).

Here, the undisputed evidence demonstrates that Baum's primary duty—the duty that she spent virtually all of her time on—was making calls on physicians. SUF ¶21. If, as Baum contends, this duty did not constitute sales work, it certainly involved the exempt administrative tasks of "promoting sales" and "representing the company." Indeed, Baum repeatedly testified that in her position at AstraZeneca she "was responsible for promoting products." SUF ¶ 60; *see also* SUF ¶ 61 ("We would promote based on the data given to us by the company."); SUF ¶ 62 (testifying that the point of making a "total office" call was to "promote to everyone" in the doctor's office); SUF ¶ 63 (testifying that she used coupons as "another tool I had to try to promote my drug."); SUF ¶ 64 (Baum's original complaint alleged that Baum "spent almost 100% of her time in promoting [AstraZeneca's] products"). "[T]hese are the types of activities contemplated as servicing a business, and thus meet

the 'directly related' test." *Palacio v. Progressive Ins. Co.*, 244 F. Supp. 2d 1040, 1047 (C.D. Cal. 2002).

C. Baum's Primary Duty Included The Exercise Of Discretion And Independent Judgment

Finally, Baum's job duties meet the short test's third and last requirement that her primary duty "include work requiring the exercise of discretion and independent judgment." 34 Pa. Code § 231.83 (5). This is not a particularly onerous test, and one that, once again, Baum easily meets. *See Wolfslayer v. Ikon Office Solutions, Inc.*, No. 03-6709, 2005 WL 181913 at *10 (E.D. Pa. Jan 26, 2005) (holding that an "employee may be exempt if her job merely `includes work' requiring discretion and independent judgment" and that the employee need not meet the more rigorous requirement of "'customarily and regularly' exercise[ing] discretion and independent judgment").

Discretion and independent judgment is defined as "the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.207(a)(2004). Further, the term implies that the person "has the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance." *Id.* Such decisions may consist of "recommendations for action rather than the actual taking of action." 29 C.F.R. § 541.207(e) (2004) (providing that the "fact that an employee's decisions may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment"). Moreover, the fact that an employee works in an industry subject to government regulation does not somehow preclude

the exercise of discretion and independent judgment or a finding of exempt status. *See, e.g.*, *Renfro v. Ind. Mich. Power Co.*, 370 F.3d 512, 519 (6th Cir. 2004) (affirming summary judgment in favor of the employer, rejecting the plaintiffs argument that "the heavily-regulated nature of their primary job duty prohibits their exercise of discretion and independent judgment"). Rather, the central inquiry is whether, within the context of applicable regulations, the employee "actually exercise[s] discretion and independent judgment." *Id.*; *see also Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 627 (11th Cir. 2004) ("That [employees'] acts were subject to review, and that they did not have limitless discretion does not mean [the employer] fails to satisfy this [discretion and judgment] element.").

* * *

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed: 08/31/2009]

No. 09-2150

KRISTIN BAUM,
Plaintiff/Appellant,

v.

ASTRAZENECA LP,
Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA
CASE NO. 03:07-cv-00090-KRG

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* * *

Second, Baum's attempted reliance on Department of Labor regulations interpreting the similar federal exemption is misplaced. *See* Appellant's Br. at 23- 24. Indeed, as noted above (*supra* at 24), the Department of Labor's position fully supports AstraZeneca. The Department has instructed that the exemption reaches all employees who "in some sense" make sales, despite "technological" factors affecting "how orders are taken and processed." *Defining and Delimiting*, 69 Fed Reg. at 22162. Thus, the exemption covers employees—such as Baum—who persuade decision-makers and "'obtain a commitment to buy,'" even if the decisionmaker places the ultimate orders with other individuals through an "internal computerized purchasing system." *Id.*

* * *

A. Baum's Primary Duty Was Related To Management Or General Business Operations.

To the extent Baum engaged in promotional work rather than sales, her primary duty satisfied the administrative exemption's requirement of "the performance of office or nonmanual work directly related to management policies or general operation of [her] employer." 34 Pa. Code § 231.83(1). As suggested by

federal guidance interpreting a nearly identical FLSA provision, this requirement "refers to the type of work performed by the employee." 29 C.F.R. § 541.201(a); *see also Stuber*, 822 A.2d at 873 (relying on federal law when interpreting Minimum Wage Act). To qualify, the employee should perform work "assisting with the running or servicing of the business" in contrast to, for example, "working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a). Further, the employee's work should be "of 'substantial importance' to management or operations." *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 9 (1st Cir. 1997).

In particular, promotion work is a quintessential example of work that meets these standards. The FLSA regulations, for example, indicate that examples of exempt work include "advertising," "marketing," "public relations," or "similar activities." 29 C.F.R. § 541.201(b). And the requirement has long been known to include "the work of employees 'servicing' the business, such as, for example, 'advising the management, planning, negotiating, *representing the company*, purchasing, *promoting sales*, and business research and control.'" *Defining and Delimiting*, 69 Fed. Reg. at 22138 (quoting Harry Weis, Report and Recommendations on Proposed Revisions of Regulations, Part 541, at 63 (June 30, 1949)) (emphasis added); *see* 29 C.F.R. § 541.203(b) (noting that employees who "market[], service[e] or promot[e] the employer's financial products" meet this requirement). The FLSA case law likewise confirms that employees who undertake promotion duties qualify. *See Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 626 (11th Cir. 2004); *Howell v. Ferguson Enter., Inc.*, No. 03-20492, 93 Fed.

App'x 12, 14-15 (5th Cir. Feb. 5, 2004); *Reich v. Avoca Motel Corp.*, 82 F.3d 238, 240 n.5 (8th Cir. 1996).

John Alden demonstrates this fact. There, the company sold insurance products to customers through independent insurance agents. 126 F.3d at 3. Its "marketing representatives" were its primary contacts with the agents. *Id.* Among other duties, the representatives kept the agents up to date on products and discussed with them the best products to promote based on their specific customers. *Id.* at 3-5. On these facts, the First Circuit concluded that the representatives' duties related to management polices or general operation. *Id.* at 8-13. Specifically, it noted that their "day-to-day activities" were "in the nature of 'representing the company' and 'promoting sales' of John Alden products, two examples of exempt administrative work." *Id.* at 10.

Here, the undisputed evidence demonstrates that Baum's primary duty—the duty on which she spent virtually all her time—was to make calls on physicians and persuade them to prescribe AstraZeneca's products for appropriate uses. J.A. 497-98 (Baum Dep. at 212-13); J.A. 435 (PSF, ¶ 56). To the extent this duty does not relate to "making sales" (as Baum argues), it nevertheless qualifies as "promoting sales" and "representing the company." Indeed, Baum repeatedly conceded that she "was responsible for promoting products." J.A. 455 (Baum Dep. at 42). She, for example, testified that she would make a "total office call" to "promote to everyone" in the doctor's office, J.A. 499 (Baum Dep. at 219-20), and that she "needed to have a medical background" "to promote effectively," J.A. 450 (Baum Dep. at 23). And it was "part of [her] job to make the physicians that [she] called on think positively of the company." J.A. 507 (Baum

Dep. at 251-52). "These are the types of classic administrative functions the regulation [] contemplates." *Haywood v. N. Am. Van Lines, Inc.*, 121 F.3d 1066, 1072 (7th Cir. 1997).

Moreover, "the *nature* of [Baum's] work" confirms that it was of substantial importance. *John Alden*, 126 F.3d at 11 (internal quotation marks omitted). Baum's duties of "representing the company" and "promoting sales" are quintessential examples of work that "affect[] business operations to a substantial degree." *Defining and Delimiting*, 69 Fed. Reg. at 22138. The undisputed evidence plainly demonstrated that Sales Specialists, such as Baum, are critical to driving sales. J.A. 664-65 (Atha Dep. at 23-28) (testifying that physician commitments obtained by Sales Specialists drive AstraZeneca sales); J.A. 653 (Ventura Dep. at 444-45) ("[T]he commitment by the physician is the first step in the selling process."); J.A. 108 (Baum Resume) (touting impact on market share). Baum thus plainly performed work "important to the success of the firm." *Haywood*, 121 F.3d at 1072; cf. *Ayotte*, 550 F.3d at 56 ("The fact that the pharmaceutical industry spends over $4,000,000,000 annually on detailing bears loud witness to its efficacy."); *Amendola*, 558 F. Supp. 2d at 477 (finding that sales representatives engage in "a matter of great consequence").

Against this backdrop, Baum's contrary arguments are baseless. She initially suggests that her work did not relate to AstraZeneca's "management policies or general operation" because she engaged in "making sales." *See* Appellant's Br. at 39. If the Court accepts this argument, however, Baum necessarily qualifies for the outside salesperson exemption. And, for this reason, Baum's reliance on *Martin v. Cooper Elec.*

Supply Co., 940 F.2d 896, 903-05 (3d Cir. 1991), is misplaced. There, the primary duties of the plaintiffs, inside salespeople, involved "*produc[ing]* wholesale sales." *Id.* at 903. To the extent this Court finds that the primary duty of Baum was to produce (or make) sales, she would count as an exempt outside salesperson.

Baum next implies that because AstraZeneca employs thousands of Sales Specialists, they did not perform work related to general operation. Appellant's Br. at 40. But she again gets nowhere. To the contrary, "'[t]hat there are a number of other employees . . . performing identical work does not affect the determination of whether they" qualify. *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 373 (7th Cir. 2005) (internal quotation marks omitted).

Baum likewise misses the mark with her assertion that she had no "duties related to . . . 'management'" and did not supervise employees. Appellant's Br. at 40. The administrative exemption is not as limited as Baum suggests. *Smith*, 2008 U.S. Dist. LEXIS 104952, at *28 (holding that one need not be "in top management and policy positions" to qualify). In fact, numerous cases have held that employees qualified even though they supervised nobody. *See Roe-Midgett v. CC Servs., Inc.*, 512 F.3d 865, 871-73 (7th Cir. 2008); *John Alden*, 126 F.3d at 9- 13; *Haywood*, 121 F.3d at 1071-72; *Howell*, 93 Fed. App'x at 14-15.

Baum's contention that she did not "servic[e] the business" because her duties were "limited" and she used only approved materials is equally off-base. Appellant's Br. at 40 (claiming that she only "carr[ied] out a portion of the promotion scheme" by engaging in "human advertisement"). Exempt employees need not "participate in the formulation of management

policies or in the operation of the business as a whole"; they may qualify for exempt status even if "their assignments are tasks related to the operation of a particular segment of the business." *Defining and Delimiting*, 69 Fed. Reg. at 22138. And Baum's position that she was a "human advertisement" is simply a concession that she fits within the exemption. Again, the regulations specifically indicate that "[w]ork directly related to management or general business operations includes . . . advertising." 29 C.F.R. § 541.201(b). Thus, because Baum (in her view) promoted sales, longstanding law dictates that she likewise meets this requirement.

B. Baum's Primary Duty Included The Exercise Of Discretion And Independent Judgment.

Baum's duties meet the short test's last requirement—that her job "include work requiring the exercise of discretion and independent judgment." 34 Pa. Code § 231.83(5). Of significance, the short test requires only that Baum's job *include* discretion; 34 Pa. Code § 231.83(5); she need not meet the long test's more demanding requirement that she "customarily and regularly exercise" it, *id.* § 231.83(2). *See Dymond v. U.S. Postal Serv.*, 670 F.2d 93, 95 (8th Cir. 1982).

Regulations interpreting an analogous FLSA requirement define "discretion and independent judgment" to involve "the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." 29 C.F.R. § 541.202(a); *see also Stuber*, 822 A.2d at 873. Employees qualify if their job includes the "authority to make an independent choice, free from immediate direction or supervision"

and "with respect to matters of significance." 29 C.F.R. § 541.202(a), (c).

In this case, the undisputed evidence demonstrates that Baum made countless "independent judgment calls" in carrying out her job functions. *Renfro v. Ind. Mich. Power Co.*, 497 F.3d 573, 577 (6th Cir. 2007) (*Renfro II*); *see also* J.A. 720 (Atha Dep. at 247-48) (describing numerous decisions Sales Specialists make during typical day). Indeed, Baum was unsupervised in the field for weeks at a time. And her duties in the complex pharmaceutical environment involved developing relationships and regularly carrying on conversations with medical care professionals about approved uses of AstraZeneca products—covering specialized areas of knowledge like physiology, disease states, drug efficacy, and drug indications, and lasting up to two to four hours. *See* J.A. 450, 478 (Baum Dep. at 23, 169). It would have been *impossible* for Baum to function without exercising substantial discretion and judgment.

* * *